



LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2011-7]

Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Copyright Office (“Office”) seeks comments on proposals to exempt certain classes of works from the prohibition on circumvention of technological measures that control access to copyrighted works. The Office has initiated a rulemaking proceeding in accordance with provisions added by the Digital Millennium Copyright Act (“DMCA”) which provide that the Librarian of Congress (“Librarian”), upon the recommendation of the Register of Copyrights, may exempt certain classes of works from the prohibition against circumvention. The purpose of this proceeding is to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make noninfringing uses due to the prohibition on circumvention. This notice publishes the classes of works received by the Office, which were proposed by several parties in the comment period that ended on December 1, 2011.

DATES: Comments addressing the Proposed Classes of Works are due by 5:00 P.M. E.S.T., February 10, 2012. Reply comments addressing points made in the initial comments are due by 5:00 P.M. E.S.T. on March 2, 2011.

ADDRESSES: All Proposed Classes of Works are available on the Copyright Office website at: <http://www.copyright.gov/1201/2011/initial/> and at the U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC. The Copyright Office strongly prefers that comments filed in response to the Proposed Classes of Works be submitted

electronically. A comment page containing a comment form will be posted on the Copyright Office Web site at <http://www.copyright.gov/1201/comment-forms>. The online form contains fields for required information including the name and organization of the commenter, as applicable, and the ability to upload comments as an attachment. To meet accessibility standards, all comments must be uploaded in a single file in either the Adobe Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter and organization should appear on both the form and the face of the comments. All comments will be posted publicly on the Copyright Office web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Copyright Office at 202–707–8380 for special instructions.

FOR FURTHER INFORMATION CONTACT: Ben Golant, Assistant General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024-0400. Telephone (202) 707-8380; telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: On September 29, 2011, the Office published a Notice of Inquiry in the **Federal Register** to initiate the fifth triennial rulemaking proceeding required by § 1201(a)(1)(C) of the Copyright Act. *See* 76 FR 60398 (Sept. 29, 2011). That notice requested comments from interested parties proposing classes of works that should be considered for exemption for the next three-year period. The Office received 20 separate filings, proposing 26 classes of works for exemption.¹ On December 5, 2011, the Copyright Office posted all of the filings received (the “Proposed Classes of Works”) on its website. *See* <http://www.copyright.gov/1201/2011/initial/>. In order to provide additional notice to interested parties, the Copyright Office is hereby publishing the Proposed Classes of Works with

¹ This is an approximation based on the manner in which the proposed classes were articulated. In some cases, the proposed class involved multiple categories of works within the class that could have been articulated as multiple classes. In other cases, there were multiple proposals that were variations on the same theme that could have been expressed as one class. In addition, a number of parties proposed similar classes. The Office has chosen to group together related classes in this Notice in order to help focus the many exemption requests.

identification of the person(s) and/or entities that proposed each class. In certain instances, such as with proposals submitted by some individuals who did not propose specific language describing a Proposed Class, the Office has fashioned language describing the Proposed Class based upon the substance of the submitted comments. The Office is taking this action, in part, to clarify the proposal to the best of the Office's ability. The Office encourages all persons responding to proposals to read the entire comment, as submitted, to make an independent assessment of the class proposed.

The comments received by the Copyright Office propose the following classes:

1. Literary works in the public domain that are made available in digital copies. Proponent: The Open Book Alliance.

2. Literary works, distributed electronically, that: (1) contain digital rights management and/or other access controls which either prevent the enabling of the book's read-aloud functionality or which interfere with screen readers or other applications or assistive technologies that render the text in specialized formats; and (2) are legally obtained by blind or other persons with print disabilities (as such persons are defined in section 121 of Title 17, United States Code), or are legally obtained by authorized entities (as defined in such section) distributing such work exclusively to such persons. Proponent: American Council of the Blind and the American Foundation for the Blind.

3. Computer programs that enable lawfully acquired video game consoles to execute lawfully acquired software applications, where circumvention is undertaken for the purpose of enabling interoperability of such applications with computer programs on the gaming console. Proponent: The Electronic Frontier Foundation.

4. Computer programs that enable the installation and execution of lawfully obtained software on a personal computing device, where circumvention is performed by or at the request of the device's owner. Proponent: Software Freedom Foundation.

5. Computer programs that enable wireless telephone handsets ("smartphones") and tablets to execute lawfully obtained software applications, where circumvention is undertaken for the purpose of

enabling interoperability of such applications with computer programs on the handset or tablet.

Proponent: The Electronic Frontier Foundation.

6A. Computer programs, in the form of firmware or software, including data used by those programs, that enable mobile devices to connect to a wireless communications network, when circumvention is initiated by the owner of the device to remove a restriction that limits the device's operability to a limited number of networks, or circumvention is initiated to connect to a wireless communications network. Proponent: Consumers Union.

6B. Computer programs, in the form of firmware or software, including data used by those programs, that enable wireless devices to connect to a wireless communications network, when circumvention is initiated by the owner of the copy of the computer program principally in order to connect to a wireless communications network and access to such communications network is authorized by the operator of such communications network. Proponent: Youghiogheny Communications, LLC.

6C. Computer programs, in the form of firmware or software, including data used by those programs, that enable wireless devices to connect to a wireless communications network, when circumvention is initiated by the owner of the copy of the computer program solely in order to connect to a wireless communications network and access to such communications network is authorized by the operator of such communications network. Proponents: MetroPCS Communications, Inc./RCA-The Competitive Carriers Association (filing separately).

7A. Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use in the following instances:

- (i) Educational uses by college and university professors and by college and university film and media studies students;

(ii) Documentary filmmaking;

(iii) Noncommercial videos

Proponent: University of Michigan Library.

7B. Audiovisual works on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use. Proponent: The Electronic Frontier Foundation.

7C. Audiovisual works that are lawfully made and acquired via online distribution services, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use, and the works in question are not readily available on DVD. Proponent: The Electronic Frontier Foundation.

7D. Motion pictures that are lawfully made and acquired from DVDs protected by the Content Scrambling System and Blu-Ray discs protected by Advanced Access Content System, or, if the motion picture is not reasonably available on DVD or Blu-Ray or not reasonably available in sufficient audiovisual quality on DVD or Blu-Ray, then from digitally transmitted video protected by an authentication protocol or by encryption, when circumvention is accomplished solely in order to incorporate short portions of motion pictures into new works for the purpose of fair use, and when the person engaging in circumvention reasonably believes that circumvention is necessary to obtain the motion picture in the following instances: (1) documentary filmmaking; OR (2) fictional filmmaking. Proponent: International Documentary Association, Kartemquin Educational Films, Inc., National Alliance for Media Arts and Culture, and Independent Filmmaker Project (filing jointly).

7E. Motion pictures that are lawfully made and acquired from DVDs protected by the Content Scrambling System or, if the motion picture is not reasonably available on or not reasonably available in sufficient audiovisual quality on DVD, then from digitally transmitted video protected by an authentication protocol or by encryption, when circumvention is accomplished solely in order to incorporate short portions of motion pictures into new works for the purpose of fair use, and when the person engaging in circumvention reasonably believes that circumvention is necessary to obtain the motion picture for multimedia e-book authorship. Proponent: Mark Berger, Bobette Buster, Barnet Kellman, and Gene Rosow (filing jointly) (contained in comment submitted by the International Documentary Association et al.).

7F. Motion pictures on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the incorporation of short portions of motion pictures into new works for the purpose of criticism or comment, and where the person engaging in circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of educational uses by college and university professors and by college and university film and media studies students. Proponent: Library Copyright Alliance.

7G. Audiovisual works (optical discs, streaming media, and downloads) that are lawfully made and acquired when circumvention is accomplished by college and university students or faculty (including teaching and research assistants) solely in order to incorporate short portions of video into new works for the purpose of criticism or comment. Proponent: Peter Decherney, Katherine Sender, Michael Delli Carpini, International Communication Association, Society for Cinema and Media Studies, and American Association of University Professors (filing jointly).

8. Lawfully accessed audiovisual works used for educational purposes by kindergarten through twelfth grade educators. Proponent: Media Education Lab at the Harrington School of Communication and Media at the University of Rhode Island.

9A. Motion pictures and other audiovisual works delivered via Internet protocol (IP) protected by technological measures that control access to such works when circumvention is accomplished to facilitate the creation, improvement, or rendering of visual representations or descriptions of audible portions of such works for the purpose of improving the ability of individuals who may lawfully access such works to perceive such works. Proponent: Telecommunications for the Deaf and Hard of Hearing, Inc., Gallaudet University, and Participatory Culture Foundation (filing jointly).

9B. Motion pictures and other audiovisual works delivered via Internet protocol (IP) protected by technological measures that control access to such works when circumvention is accomplished to facilitate the creation, improvement, or rendering of audible representations or descriptions of visual portions of such works for the purpose of improving the ability of individuals who may lawfully access such works to perceive such works. Proponent: Telecommunications for the Deaf and Hard of Hearing, Inc., Gallaudet University, and Participatory Culture Foundation (filing jointly).

9C. Motion pictures and other audiovisual works on fixed disc-based media protected by technological measures that control access to such works when circumvention is accomplished to facilitate the creation, improvement, or rendering of visual representations or descriptions of audible portions of such works for the purpose of improving the ability of individuals who may lawfully access such works to perceive such works. Proponent: Telecommunications for the Deaf and Hard of Hearing, Inc., Gallaudet University, and Participatory Culture Foundation (filing jointly).

9D. Motion pictures and other audiovisual works on fixed disc-based media protected by technological measures that control access to such works when circumvention is accomplished to facilitate the creation, improvement, or rendering of audible representations or descriptions of visual portions of such works for the purpose of improving the ability of individuals who may lawfully access such works to perceive such works. Telecommunications for the Deaf and Hard of Hearing, Inc., Gallaudet University, and Participatory Culture Foundation (filing jointly).

10A. Motion pictures on lawfully made and lawfully acquired DVDs that are protected by the Content Scrambling System when circumvention is accomplished solely in order to accomplish the noncommercial space shifting of the contained motion picture. Proponent: Public Knowledge.

10B. Legally acquired digital media (motion pictures, sound recordings, and e-books) for personal use and for the purposes of making back-up copies, format shifting, access, and transfer.

Proponents: Cassiopaea Tambolini, Susan Fuhs, Kellie Heistand, Andy Kossowsky, and Curt Wiederhoeft (filing separately).

These Proposed Classes of Works represent a starting point for further consideration in this rulemaking proceeding. The Office does not represent that any particular class proposed for exemption will ultimately be recommended by the Register of Copyrights to the Librarian of Congress. Moreover, the delineation of any class as proposed by a commenter will be considered in relation to the facts presented in the entire rulemaking process. To the extent that an exemption is deemed warranted by the evidence, a Proposed Class listed herein may be developed and/or refined by the Register in her final recommendation to the Librarian.

This Notice hereby requests responsive written initial comments from all interested parties, including representatives of copyright owners, educational institutions, libraries and archives, scholars, researchers and members of the public, in order to elicit additional evidence either supporting or opposing the classes of works proposed for exemption. The forthcoming initial comment period allows the introduction of additional factual information that would assist the Office in assessing whether a Proposed Class is warranted for exemption and, if it is, how such a class already proposed should be properly tailored. Comments responsive to the Proposed Classes may also suggest modest refinements to the Proposed Classes and supply additional evidence, but may not propose completely new classes of works.

It is important to reiterate that Proponents of the exemptions enumerated above should have presented their *entire* case in their initial filings. A proponent of a particular class of works will not be permitted to submit an initial comment in support of that class in response to this Notice unless, at least

15 days before the deadline for comments (*i.e.*, before January 27, 2012), the proponent has submitted a written request for permission to submit an initial comment demonstrating good cause to permit the submission of the comment, and the Office has approved the submission of the comment. The purpose of this requirement is to provide for the orderly presentation of evidence and arguments, and to permit both proponents and opponents to present their best cases. *See* 76 FR 60398, 60403 (Sept. 29, 2011).

Persons submitting comments should thoroughly review the Notice of Inquiry published in the Federal Register on September 29, 2011 to familiarize themselves with the substantive and formal requirements for the submission of comments.

Reply comments may be submitted by any person, including the initial proponent of a Proposed Class of Works, but should respond only to points made in the initial comments.

Dated: December 15, 2011

Maria A. Pallante,
Register of Copyrights.

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